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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 689.

FREEMAN J. THOMSON, ADMINISTRATOR OF THE ESTATE OF ARTHUR W. THOMSON, DECEASED, PETITIONER,

VS.

CAROLINE THOMSON, RESPONDENT.

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SCHULTZ & BODNEY,
WHITE & HALL,
HARRY A. HALL,
Attorneys for Respondent.

Table of Cases Cited

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Petitioner's application for Writ of certiorari to reverse the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this cause (reported in 156 F. 2d 581) fails to present any legal grounds for the issuance of the Writ.

Ordinarily certiorari is issued by this court to the Circuit Courts of Appeals for two reasons, first, to secure uniformity of decisions between the courts of the various circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court.

In *Magnum* v. *Coty*, 262 U. S. 159, 67 L. Ed. 922, 43 S. Ct. 531, this court expressed the rule thus, l. c. 532:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Since the decision of this court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, conflict of opinion on questions controlled by state law no longer serve as grounds for the issuance of the Writ. As stated by this court recently in *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 58 S. Ct. 860, l. c. 861.

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

Obviously none of the grounds enumerated in Rule 38 of this court are present in this case and there is no contention whatever that the issues presented are those of great public interest.

A study of the petition discloses that the chief complaint is a criticism of the conclusions reached by the court upon the evidence in the case, although it is well established that certiorari will not be granted to review the evidence or inferences drawn thereon.

General Talking Pictures Corporation v. *Western Electric Company*, 58 S. Ct. 849, 304 U. S. 175, 82 L. Ed. 1273.

Muschany v. *U. S.*, 65 S. Ct. 442, 324 U. S. 49.

The Questions Presented Do Not Justify the Issuance of the Writ.

Points A and B of the petition (10) are based upon the claim that the policy itself was not printed in full in the record, and that this deprived the court of appeals of jurisdiction.

This argument is clearly untenable for several reasons. In the first place no such claim was ever presented to the Circuit Court of Appeals. It is axiomatic that this court will not determine issues nor decide questions which were not dealt with by the court of appeals.

Owens v. *Union Pacific Railroad*, 63 S. Ct. 1271, 319 U. S. 715, 87 L. Ed. 57.

Sonjinsky v. *U. S.*, 57 S. Ct. 554, 81 L. Ed. 772, 300 U. S. 506.

Burnet v. *Commonwealth Improvement Co.*, 53 S. Ct. 198, 287 U. S. 417, 77 L. Ed. 1139.

The fact is that the policy was not the basis of the litigation nor respondent's claim since there was no dispute as to it or any of its terms. The insurance company paid the money into court without dispute and respondent's contentions were appropriately stated by the court of appeals in the second paragraph of the opinion as follows (R. 125):

> "It was contended by appellant, Caroline Thomson, in the trial court, and she renews the contention here, that an oral contract was entered into between her and the insured, by the terms of which she acquired a vested interest in the proceeds of the policy, which could not as between her and the insured be taken from her by his act."

The policy was attached as an exhibit to the interpleader petition filed by the insurance company, but was

never formally introduced in the record as an exhibit by either party. As a matter of fact, however, the record on appeal was prepared as it was, upon full consultation with counsel for petitioner and with his full approval, and he so stipulated as follows (R. 120):

> "It is hereby stipulated and agreed that the foregoing is a full, true and complete transcript of the record and proceedings in the cause of *John Hancock Mutual Life Insurance Company, a corporation,* v. *Caroline Thomson, and Freeman J. Thomson, administrator* No. 3189, and the same is hereby approved."
>
> (Signed) Harry A. Hall,
> Attorney for Appellant.
>
> (Signed) Harvey E. Hartz,
> Attorney for Respondent.

In this connection it is interesting to note that the only provisions of the policy relied upon by the petitioner here, are exactly the same provisions which were incorporated by agreement in the record, and which were fully considered by the court.

Point C (11) made by petitioner is that the court erroneously construed the policy whereas, there was no such issue in the case. The opinion of the court clearly is not founded on any construction of the policy and petitioner made no claim of error in this regard in that court.

Section D (11) questions the court's construction of the evidence which is not within the purview of the writ of certiorari. The record clearly shows that the evidence was duly considered by the court, and showed the respondent's equitable right to the policy proceeds was virtually undisputed and conclusively established.

The further complaint of conflict of opinion with that of other Circuit Courts of Appeals is without foundation,

and an examination of the opinion conclusively establishes this fact. This claim was first made in a Supplemental Motion for Rehearing filed by petitioner, with respect to two cases (143), *Doering* v. *Buechler,* 146 F. 2d 784 (8th C. C. A.), and *Rawls* v. *Penn Mutual Life Insurance Co.,* 253 Fed. 725 (5th C. C. A.). Such claim has apparently been abandoned since neither of these cases have been mentioned in the petition for certiorari. In other words, the conflict now claimed was never presented to the Circuit Courts of Appeals. As a matter of fact, a review of the decisions cited show that there is no conflict and the cases are not even remotely in point.

The final claim is that the court's opinion is in conflict with the opinions of the Missouri Courts and is likewise untenable. No such claim was ever made prior to the filing of this petition, and the cases cited by the petitioner clearly show no conflict exists. Actually the court's opinion is in full accord with the rulings of the Missouri Courts on this point, and in fact the court followed and approved *Chapman* v. *McIlwrath,* 37 Mo. Sup. 38, decided by the Missouri Supreme Court upon almost identical facts.

The same rule was approved by the Missouri Court in *Fendler* v. *Roy,* 58 S. W. 2d 459, 331 Mo. 1083.

In conclusion we respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

SCHULTZ & BODNEY,
WHITE & HALL,
HARRY A. HALL,
Attorneys for Respondent